

No. 46850-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**MICHAEL LARISCH,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## **I. ISSUES**

- A. Was Deputy Humphrey's testimony regarding Larisch's gesture a comment on Larisch's right to silence, and if so, did the trial court err when it ruled the testimony was admissible?
- B. Did Larisch receive effective assistance from his trial counsel?
- C. Did the State present sufficient evidence to support Larisch's conviction for Count Six, Trafficking in Stolen Property in the First Degree?
- D. Did the trial court erroneously calculate Larisch's offender score because it failed to count as same criminal conduct Counts One, Two and Five?
- E. Did the trial court erroneous impose non-mandatory legal financial obligations upon Larisch without first determining if he had the present and future ability to pay those obligations?

## **II. STATEMENT OF THE CASE**

Gary Gray and Ralph McEntyre are co-owners of a nursery in Rochester, Washington. RP 45, 68. On July 3, 2014, a number of items were taken from the nursery, including, a Kubota excavator, and equipment trailer, an extra bucket, controllers for the dump trailer, a battery, miscellaneous straps and tie-downs. RP 45-46, 68. When they discovered the missing items they also noticed that the gate to the property was open, which was not normal, and the lock on the gate was broken off. RP 46-47. Mr. Gray and Mr.

McEntyre had not given anyone permission to take those items. RP 47, 68. There was glass found on the ground but it did not appear to be from one of the missing items. RP 60. The glass looked like broken auto glass. RP 168-69.

A couple of the items had distinctive markings or modifications. RP 69. The excavator had a burn mark on the seat and a hole drilled through the ceiling. RP 69. The trailer had four "D" rings on the deck. RP 69. The trailer, which was purchased the year before, was purchased for \$6,500. RP 48. The serial number had been ground off the trailer prior to Mr. McEntyre purchasing it. RP 49. They purchased the excavator for \$35,000, to replace it would cost approximately \$45,000. RP 52. The excavator was still worth about \$28,000. RP 52.

Approximately three miles from the nursery is Auto Tech Services an automotive repair shop. RP 121, 123. On July 3, 2014, Andrew Bowlds' 1995 white GMC 2500 was stolen from the repair shop. RP 121. The truck would run fine when it was cold but once it got to normal running temperature the truck would start to cut out. RP 133. There was a pile of glass located where the driver's door had been. RP 126. The truck was a 6.5 diesel. RP 122.



Mr. Gray posted status reports and offered a reward for information regarding the stolen items on Facebook. RP 70. Mr. Gray received information in early August regarding the excavator. RP 70. On August 2, 2014 Mr. Gray found the excavator on Scheuber Road on Terry Petrich's property. RP 70-72. Mr. Gray called the police. RP 71. There was damage to the excavator, the ignition was not the original, it had been cut off and a different ignition had been put in. RP 72.

Lewis County Sheriff's Deputy Humphrey was dispatched to Mr. Petrich's residence regarding the stolen excavator. RP 84-85. Steven Clokey walked off when Deputy Humphrey arrived but came back after Deputy Anderson retrieved Mr. Clokey. RP 85-86. Mr. Petrich explained that the excavator had been on his property over the summer of 2014. RP 185-86. Mr. Petrich ended up with the excavator because he needed to clean up his property or receive a citation from the county. RP 186. The excavator was brought to the property, loaded on some type of trailer, by Larisch and one of his friends. RP 189. Mr. Petrich made a deal with Larisch to clean up the property in exchange for some vehicles Mr. Petrich had. RP 186. Larisch was going to use the excavator to do the clean up of the property. RP 186-87. As part of their deal, Mr. Petrich gave

Larisch a used Ford Bronco, a BMW and white Dodge pickup. RP 187. Larisch did part of the agreed work, bladed the property out and moved brush around. RP 187. When Larisch was not working with the excavator he was working on the vehicles Mr. Petrich had given him. RP 187-88. Mr. Clokey used the excavator when Larisch was not operating it. RP 188.

While speaking to Mr. Petrich about the excavator, Deputy Humphrey saw a truck pass by. RP 86. The truck was driven by Larisch. RP 190. Mr. Petrich's son alerted deputies that Larisch had just drove past. RP 190. Deputy Humphrey later contacted Larisch because he believed Larisch was the suspect who had dropped off the excavator at Mr. Petrich's property. RP 87. Larisch first denied any knowledge of the excavator or having any involvement whatsoever in the excavator. RP 90. Deputy Humphrey saw the extra bucket for the excavator in the back of Larisch's pickup truck. RP 90-91. Deputy Humphrey asked Larisch how the extra bucket got in the back of his truck. RP 92.

At that point Mr. Larisch changed his story and began to tell me that he had only worked on the excavator for Mr. Petrich. He said he was a mechanic by trade and that he had done - - been doing some work for Mr. Petrich on the excavator to include working on that particular bucket that was in the back of the truck he was driving as well as stated he did some wiring on the ignition of the excavator.

RP 92.

A couple of days later Deputy Humphrey followed up on the case and contacted Connie Todd, as she had contacted Mr. Gray regarding the engine and transmission that were stolen. RP 76, 93. Deputy Humphrey next spoke to Brandon Perry about an engine and transmission. RP 93-94. The engine and transmission were still attached to each other, hanging from a tree at Mr. Perry's residence. RP 94. Deputy Humphrey was able to get some numbers off the engine and transmission. RP 94. Deputy Humphrey asked Smokey Padget, who is a certified VIN inspector trained through the Washington State Patrol to locate numbers on engines, transmission and other body parts, to look at the engine. RP 95, 210. Mr. Padget could not match the serial numbers off the engine and transmission to the particular truck because GMC only keeps their records back 10 years. RP 212. Due to the condition he found the transmission and engine in, Mr. Padget believed they were stolen. RP 212.

Mr. Gray found the missing trailer on Gary Fisher's property in Rochester. RP 74-75. Mr. Gray could identify the trailer by the "D" rings that had been put on the trailer. RP 75. There was damage done to the trailer. RP 75. Because the serial number had

been ground off, they found another serial number located on the trailer and it matched the serial number of Mr. Gray's trailer. RP 75-76.

Deputy Humphrey went back and re-interviewed Larisch. RP 96. Larisch stuck to his story about working on the excavator for Mr. Petrich. RP 96. Deputy Humphrey asked Larisch about selling the engine and transmission to Mr. Perry. RP 96. Larisch dropped his head, closed his eyes and began slightly shaking his head. RP 96. Larisch then declined to answer any further questions. RP 96.

The State charged Larisch, by amended information, with Count I: Possession of a Stolen Vehicle, Count II: Possession of Stolen Property in the Second Degree, Count III: Possession of a Stolen Vehicle, Counts IV-VI: Trafficking in Stolen Property in the First Degree. CP 6-8. There was a CrR 3.5 hearing the morning of trial. RP 17-28. The trial court ruled that the State may introduce Larisch's non-verbal actions, dropping his head down and shaking it but could not assert that Larisch was in custody. RP 27-28.

Larisch elected to have his case tried to a jury. See RP. Sean Sullivan testified on Larisch's behalf. RP 235. According to Mr. Sullivan's testimony, Mr. Sullivan is not friends with Larisch, but knows of him. RP 235. Mr. Sullivan knows Mr. Petrich because Mr.

Sullivan and a friend bought a vehicle from Mr. Petrich about a year and a half prior. RP 235-36. Mr. Sullivan has had multiple dealings with Mr. Petrich. RP 236. Mr. Petrich attempted to sell Mr. Sullivan a backhoe once and some truck stuff. RP 236. Mr. Sullivan testified that Mr. Petrich showed up at a logging job site with the backhoe. RP 236. The job site was up Highway 12 in Lewis County. RP 236. Mr. Petrich had called up Mr. Sullivan a couple of days before and told him he had an excavator for \$5,000 and Mr. Sullivan said he would be interested in taking a look at it, maybe buying it. RP 236-37. A couple days later Mr. Petrich dropped off the backhoe. RP 237. The Kubota excavator is the one Mr. Petrich dropped off. RP 237-38. Mr. Petrich left the excavator for a day. RP 238. Mr. Sullivan was concerned about the excavator because the ignition looked broken and jerry rigged. RP 238-39. The machine was also worth much more than Mr. Petrich was asking for it. RP 239. Mr. Sullivan denied knowing Larisch, and denied talking to Larisch about this case. RP 248.

Larisch was found guilty of Counts I, II, V and VI. CP 66-67, 70-71. Larisch was found not guilty of Counts III and IV. CP 68-69. Larisch was sentenced with an offender score of 12 for Count I and an offender score of 8 for Counts II, V and VI. CP 109. The trial

court imposed an exceptional sentence based upon the aggravating factor found by the court, finding that due to Larisch's high offender score, Count I would go unpunished if it did not run consecutive. CP 109. Larisch was sentenced to a total of 96 months in custody. CP 110. Larisch timely appeals his convictions and sentence. CP 118.

The State will supplement the facts as needed throughout its argument.

### **III. ARGUMENT**

#### **A. DEPUTY HUMPHREY'S TESTIMONY REGARDING LARISCH'S GESTURE AFTER ASKING ABOUT THE ENGINE LARISCH SOLD TO BRANDON PERRY WAS NOT A COMMENT ON LARISCH'S RIGHT TO REMAIN SILENT.**

Larisch argues that his Fifth Amendment right to remain silent was violated when the trial court allowed the State to admit a gesture he made prior to invoking his right to silence. Brief of Appellant 16-23. The elicitation of Larisch's gesture was not a comment on his right to remain silent but rather testimony regarding his response to a question from Deputy Humphrey prior to invoking his right to silence. If the trial court's ruling allowing the testimony was in error, the error was harmless.

#### **1. Standard Of Review**

Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

**2. The Testimony Of Deputy Humphrey Was Not An Impermissible Comment On Larisch's Right To Silence.**

Larisch argues the testimony regarding his gesture, which was in response to Deputy Humphrey's questioning Larisch about selling the engine and transmission to Mr. Perry, was a comment on Larisch's right to silence in violation of the Fifth Amendment of the United States Constitution and Article 1, Section 9 of the Washington State Constitution. Brief of Appellant 16-23. Larisch encourages this Court to find the error here similar to that found in *State v. Easter*, 130 Wn.2d 228, 922 P.3d 1285 (1996). Brief of Appellant 19-22. Deputy Humphrey's testimony was in regards to Larisch's answer to a question, not an invocation of his right to silence, and was not a comment on Larisch's silence. There was no error.

A person cannot be compelled in a criminal case to provide evidence against him or herself. U.S. Const. amend. V; Const. art. I, § 9. A person who invokes his or her right to silence may not have that silence used as substantive evidence of guilt in a criminal trial. *State v. Sloan*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006),

*citing Easter*, 130 Wn.2d at 238 (additional citations omitted). It is a violation of a defendant's due process rights for the State to exploit or comment on the defendant's choice to exercise his or her right to remain silent. *State v. Romero*, 114 Wn. App. 779, 786-87, 54 P.3d 1255 (2002), *citing Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), *State v. Fricks*, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979). The State, therefore, “cannot elicit comments from a witness that are related to a defendant's silence or make such comments during closing arguments in order to infer guilt. *Sloan*, 133 Wn. App. at 127 (citations omitted).

When the defendant's exercise of his or her right to remain silent is raised, the reviewing Court “must consider whether the prosecutor manifestly intended the remarks to be a comment on [the right to remain silent].” *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 204 (2008) (internal quotations and citations omitted). A mere reference to a defendant's silence does not amount to a comment on his or her right to silence. *Burke*, 163 Wn.2d at 216. “When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say,” as it is not a matter of an exercise of the right to silence. *State v. Hager*, 171 Wn.2d 151, 158, 248 P.3d 512 (2011) (internal citations



omitted). On the other hand courts liberally construe a person's constitutional right to remain silent. *State v. Fuller*, 169 Wn. App. 797, 814, 282 P.3d 126 (2012). A person may elect what information to share with police and does not give up the right to silence by answering some questions but not others. *Fuller*, 169 Wn. App. at 814-15.

In *State v. Keene*, this Court held that the deputy prosecutor and the detective who testified impermissibly commented on Keene's right to silence. *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997). The detective "testified that she never heard from Keene after she warned him that she would turn the case over to the prosecuting attorney if she did not hear from him again." *Keene*, 86 Wn. App. at 594. The deputy prosecutor used Keene's failure to contact the detective as substantive evidence to infer guilt by telling the jury "it could decide if Keene's failure to contact the detective was the act of an innocent man." *Id.*

In *Fuller* the defendant invoked his right to partial silence by not answering, post-arrest, some of the detective's questions. *Fuller*, 169 Wn. App. at 816. The partial invocation prevented the State from using Fuller's silence to infer his guilt, and therefore the State could not elicit testimony regarding the silence or comment

on the silence as to infer Fuller's guilt. *Id.* The State repeatedly used Fuller's failure to deny murdering the victim as an inference that Fuller was guilty of the crime of murder. *Id.* The Court of Appeals held this conduct violated Fuller's right to silence, and the violation was not harmless beyond a reasonable doubt. *Id.* at 818-20.

Deputy Humphrey's trial testimony regarding Larisch's gesture went as follows:

Q All right. And did he say anything about involvement with the excavator beyond what you already told me?

A No. He pretty much stuck to his story as far as working on the excavator for Mr. Petrich. He denied any involvement in taking it or having anything to do with that.

Q Did you ask him any questions with regard to whether he had sold this car engine that you looked at to Brandon Perry?

A I did.

Q What was the question you asked him or what did you say to him about that?

A I asked him about selling the engine and transmission out of a GMC pickup to Brandon Perry.

Q And did Mr. Larisch make any gesture in response to that question?

A He did.

Q What was it?

A Mr. Larisch dropped his head, closed his eyes, began slightly shaking his head.

RP 96. The testimony was clear that this was in response to the question asked about selling the engine to Mr. Perry. After Larisch responded to the question he unequivocally invoked his right to silence. RP 24-25. Larisch attempts to paint his response to Deputy Humphrey's question as a simultaneous gesture with his invocation of his right to silence. Brief of Appellant 19. The testimony from Deputy Humphrey does not support this interpretation. A person can answer a question and then invoke their right to silence and all questioning must therefore cease, which it did in this case.

Further the State, from the beginning of the trial, announced its intent to not comment on Larisch's invocation of his right to silence. CP 105. The State did not comment on Larisch's right to silence as an inference of guilt during its' closing argument. RP 282-83. The State reminded the jurors of what Larisch's response was to Deputy Humphrey's question if Larisch sold the engine and transmission to Mr. Perry. RP 282-83.

In a nutshell, that's all you've got. That's the story. Well, there's one other little thing you have. You have the fact that Deputy Humphrey diligently goes back to interview Mr. Larisch again after he's got all the information and he talks to him about it and again Mr. Larisch discusses how he didn't have much to do with

the excavator. And so Deputy Humphrey says, "Well, hey, what about the engine you sold to Brandon Perry?" And you get the, (indicating).

RP 282-83.

There was no impermissible comment on Larisch's right to remain silent as guaranteed by the Fifth Amendment. Larisch's gesture was in response to Deputy Humphrey's question regarding the stolen engine. After responding Larisch exercised his right to remain silent by telling the deputy he no longer wished to speak to Deputy Humphrey. RP 24-25. The sequence of events was clear in Deputy Humphrey's testimony at the CrR 3.5 hearing. RP 24-25. The State asked, right. "Well, actually, for purposes of this hearing did he make any statements after he made that gesture?" RP 24. Deputy Humphrey responded, "Yes. He told me that he didn't want to talk about the case anymore after that." RP 25. There was no error in admitting the testimony and this Court should affirm the conviction.

### **3. If Deputy Humphrey's Testimony Was In Error, Any Error Was Harmless.**

A comment on a defendant's right to silence can be harmless error. *State v. Pottorff*, 138 Wn. App. 343, 346-48, 156 P.3d 955 (2007). In *Pottorff* the court differentiated the review standards of the harmless error analysis based upon what type of

comment was made by the State. *Pottorff*, 138 Wn. App. at 347. The court explained that the prejudice incurred as the result of a direct comment about a person's right to remain silent would require the State to show the error was harmless beyond a reasonable doubt. *Id.* "A direct comment occurs when a witness or state agent makes a reference to the defendant's invocation of his or her right to remain silent." *Id.* at 346.<sup>1</sup> A constitutional error is deemed harmless if the reviewing court is certain beyond a reasonable doubt that the verdict is unattributable to the error. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). The Supreme Court has held, "[t]his court employs the overwhelming untainted evidence test and looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt." *Anderson*, 171 Wn. 2d at 770.

Whereas, the prejudice incurred when the State makes an indirect comment on a person's right to silence is reviewed under the lower standard, which determines whether no reasonable probability exists that error affected the outcome. *Pottorff*, 138 Wn.

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<sup>1</sup> The court gave the following as examples of direct comment on the evidence: An officer testifying that he read a defendant his *Miranda* warnings and the defendant chose not to waive his right to remain silent and would not speak to the officer. An officer testifies that a defendant would not speak to the officer and requested an attorney. See *Pottorff*, 138 Wn. App. at 347. (referring to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)).

App. at 347. The State makes an indirect comment on a person's right to silence when it, through a witness or the deputy prosecutor, references an action or comment made by the defendant which could be inferred as an attempt by the defendant to exercise his or her right to silence. *Id.*, citing *State v. Lewis*, 130 Wn.2d 700, 706, 927, P.2d 235 (1996).<sup>2</sup>

Larisch incorrectly argues that the State must show the error was harmless beyond a reasonable doubt. Brief of Appellant 22. The testimony, at best, was an indirect comment on Larisch's right to remain silent. The testimony describing Larisch dropping his head, closing his eyes and shaking his head would be considered an action which could be inferred as an attempt by Larisch to exercise his right to silence. *Pottorff*, 138 Wn. App. at 347. Therefore, the correct test is whether no reasonable probability exists that the error affected the outcome. *Id.*

There was no reasonable probability that the error alleged by Larisch affected the outcome of his trial. The indirect comment on Larisch's right to silence was dwarfed by the overwhelming evidence that Larisch committed the crimes he was convicted of

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<sup>2</sup> "[O]fficer did not testify the defendant refused to talk, but rather that the defendant claimed he was innocent ...[O]fficer's testimony that the defendant would take polygraph test after discussing the matter with his attorney was an indirect reference to silence."

committing. Larisch argues that the evidence that Larisch sold the engine from the truck to Mr. Perry was the weakest the State presented and therefore, without an absolute identification that the engine recovered was the engine from the truck the State cannot prevail for Count Six. Brief of Appellant 22-23. This is incorrect. There was overwhelming circumstantial evidence presented that the engine sold to Mr. Perry by Larisch was the engine out of Mr. Bowlds' truck, which is sufficient to satisfy the no reasonable probability standard.

Mr. Scott, whom Larisch lived with, stated that Larisch showed up with an engine sometime around mid-July 2014. RP 117. Mr. Bowlds' truck was stolen on July 3, 2014. RP 121. The truck had a 6.5 liter diesel engine and was a manual transmission. RP 122, 131. Mr. Scott knew Mr. Perry was looking for an engine and told him that Larisch had one. RP 118. Ms. Todd had enough concern about where the engine came from as to alert Mr. Perry that the police were looking for a motor that Mr. Perry may have purchased. RP 113.

Deputy Humphrey contacted Mr. Perry in regards to the missing engine and transmission. RP 94. Deputy Humphrey could see an engine and transmission hanging from a tree at Mr. Perry's

residence. RP 94. Mr. Perry came into possession of the engine and transmission around August 5, 2014. RP 102. Deputy Humphrey learned that Mr. Perry had purchased the engine and transmission from Larisch for \$500 cash. RP 103. Deputy Humphrey had Smokey Padget, a Lewis County Code Officer, who was trained as a certified VIN inspector trained through the Washington State Patrol to locate numbers on engines, transmission and other body parts. RP 210. Mr. Padget examined the engine in question and saw markings that would help him determine what kind of vehicle the engine came from. RP 210. While Mr. Padget could not match the serial numbers to the particular truck because GMC only keeps those records dating back 10 years, Mr. Padget did testify that it was the engine and transmission for a '95 GMC. RP 211. The transmission was a manual transmission and the engine was a diesel engine. RP 212, 217. Mr. Padget also explained that the engine and transmission appeared to be stolen.

The way it was removed, all of the wiring harnesses were cut instead of unplugged. Most every wiring harness has a connector to plug from the vehicle chassis to the engine. All of those were cut instead of taken apart. And a lot of people tape them to make sure you can plug them back in. All the wires were cut. The exhaust was cut off with some kind of saw instead have [sic] unbolted. The power steering hoses



were cut instead of removed. The things you do when you're in the hurry to get an engine out, not things you would do when you're going to try to put an engine back into a truck and use it.

RP 212.

The engine recovered from Mr. Perry's house was the same make and model that came from Mr. Bowlds' truck. Larisch showed up with the engine around mid-July and Mr. Perry came into possession of the engine around the beginning of August. The circumstantial evidence for the Trafficking in Stolen Property in the First Degree charge regarding the engine was overwhelming. There is no reasonable probability that the alleged error affected the outcome of this trial, and therefore the error is harmless. Larisch's conviction should be affirmed.

**B. LARISCH RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.**

Larisch's attorney provided competent and effective legal counsel throughout the course of his representation. Larisch asserts his trial was ineffective for failing to object to Deputy Humphrey's statement that he believed Larisch's gesture of dropping his head and shaking his head meant Larisch got caught. Brief of Appellant 23-27. Larisch's attorney was not ineffective in

any of the areas of his representation of Larisch. If Larisch's attorney was deficient in any way, Larisch cannot show he was prejudiced in regards to Count Six by his attorney's conduct and his ineffective assistance claim therefore fails.

### **1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 125 (1995) (citations omitted).

### **2. Larisch's Attorney Was Not Ineffective During His Representation Of Larisch Throughout The Jury Trial.**

To prevail on an ineffective assistance of counsel claim Larisch must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v.*

*McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is "such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Id.* (internal quotations

and citations omitted). A law enforcement officer's testimony can carry a "special aura of reliability" and therefore may be especially prejudicial to the defendant. *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, "(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Id.* at 332-33.

Failure to object to testimony will constitute ineffective assistance of counsel only in "egregious circumstances" or testimony central to the State's case. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). If trial counsel's failure to object could have been a legitimate trial tactic counsel is not ineffective and the ineffective assistance claim fails. *Neidigh*, 78 Wn. App. at 77. In this case, Larisch's attorney may have wanted to avoid calling attention to Deputy Humphrey's testimony that the meaning of the gesture was "[t]hat he had been caught." RP 104. It was a fleeting reference. Deputy Humphrey did not state he currently believed Larisch was guilty of Trafficking in Stolen Property or any other

crime, only that he believed at the time the gesture meant Larisch knew he had been caught.

Further, in his own cross-examination of Deputy Humphrey, Larisch's attorney asked about the gesture and hammered that it could mean different things to different people. RP 103. Deputy Humphrey did not state he believed Larisch was guilty, that Larisch appeared guilty or mention guilt at all. It was a legitimate trial tactic to just let that statement go and not object to draw further attention to Deputy Humphrey's testimony.

Arguendo, if it was deficient for Larisch's attorney to not object to the testimony, Larisch suffered no prejudice from the error. Deputy Humphrey never states which crime he believed Larisch believes he was caught for. Also, as argued above, there was overwhelming circumstantial evidence that Larisch trafficked Mr. Bowlds' stolen engine by selling it to Mr. Perry. Further given the evidence presented, there is not a reasonable probability that but for failing to object to Deputy Humphrey's testimony that he believed Larisch's gesture meant he had been caught that the outcome of the trial would have been different in regards to Count Six. See *Horton*, 116 Wn. App. at 921-22. Trial counsel was not ineffective.

**C. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT LARISCH TRAFFICKED IN STOLEN PROPERTY IN THE FIRST DEGREE FOR COUNT SIX.**

Larisch argues the State did not present sufficient evidence to sustain the jury's verdict of guilty on Count VI: Trafficking in Stolen Property in the First Degree, for trafficking Mr. Bowlds' stolen engine and transmission to Mr. Perry. Brief of Appellant 27-30. The State presented sufficient evidence to sustain the jury's guilty verdict for Count Six.

**1. Standard Of Review.**

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v.*

*Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

**3. The State Presented Sufficient Evidence To Sustain Larisch’s Conviction For Count Six: Trafficking In Stolen Property In The First Degree.**

To convict Larisch of Trafficking in Stolen Property in the First Degree, as charged in Count Six of the Amended Information, the State was required to prove, beyond a reasonable doubt, that Larisch, on or about and between July 3, 2014 and August 2, 2014, knowingly initiated, organized, planned, financed, directed, managed or supervised the theft of property for sale to others, or knowingly trafficked in stolen property, to wit: a vehicle engine. RCW 9A.82.050; CP 8, 63.

“Traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy receive possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19); CP 59.

Mr. Bowlds’ truck was stolen on July 3, 2014. RP 121. According to Mr. Scott, Larisch showed up with an engine sometime around mid-July 2014. RP 117. The truck had a 6.5 liter diesel engine and was a manual transmission. RP 122, 131. Mr. Scott knew Mr. Perry was looking for an engine and told him that Larisch had one. RP 118. Mr. Perry purchased the engine and transmission from Larisch for \$500 cash. RP 103. There was no bill of sale for the purchase. RP 103. Ms. Todd had enough concern about where the engine came from as to alert Mr. Perry that the



police were looking for a motor that Mr. Perry may have purchased. RP 113.

Deputy Humphrey contacted Mr. Perry in regards to the missing engine and transmission. RP 94. Deputy Humphrey could see an engine and transmission hanging from a tree at Mr. Perry's residence. RP 94. Mr. Perry came into possession of the engine and transmission around August 5, 2014. RP 102. Deputy Humphrey had Smokey Padget, a Lewis County Code Officer, who was trained as a certified VIN inspector trained through the Washington State Patrol to locate numbers on engines, transmission and other body parts. RP 210.

Mr. Padget examined the engine in question and saw markings that would help him determine what kind of vehicle the engine came from. RP 210. While Mr. Padget could not match the serial numbers to the particular truck because GMC only keeps those records dating back 10 years, Mr. Padget did testify that it was the engine and transmission for a '95 GMC. RP 211. The transmission was a manual transmission and the engine was a diesel engine. RP 212, 217. Mr. Padget also explained that the condition of engine and transmission, it was not removed from the

vehicle in a way consistent with a person who normally removes an engine, appeared to be stolen. RP 212.

The evidence was circumstantial. Circumstantial evidence is just as reliable as direct evidence. *Delmarter*, 94 Wn.2d at 638. It is not necessary for the State to have evidence which states with absolute certainty that the engine was the one that was removed from Mr. Bowlds' stolen truck. Viewing the evidence in the light most favorable to the state, the evidence presented to the jury is sufficient to sustain the conviction for Trafficking in Stolen Property in the First Degree for Count Six and this Court should affirm the conviction.

**D. LARISCH'S OFFENDER SCORE WAS PROPERLY CALCULATED AND HIS SENTENCE IS THEREFORE LAWFUL.**

Larisch argues his sentence is unlawful because his offender score was improperly calculated because the trial court counted each count as separate criminal conduct. Brief of Appellant at 31-34. Larisch reasons that Counts One, Two and Five were all part of the same criminal episode, had the same victim and one objective and are therefore, should have been considered the same criminal conduct. Larisch incorrectly applies the test for same criminal conduct, counting the trafficking as the same as the theft. The trial

court correctly counted each crime Larisch was convicted of as separate criminal conduct and his offender score was accurately calculated. This Court should affirm Larisch's sentence.

### **1. Standard Of Review.**

Offender scores are reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). A claim that two crimes encompass the same criminal conduct is reviewed under a misapplication of the law or an abuse of discretion standard. *State v. Grantham*, 84 Wn. App. 854, 857, 932 P.2d 657 (1997) (citation omitted). A trial court abuses its discretion when it "(1) adopts a view that no reasonable person would take and is thus "manifestly unreasonable," (2) rests on facts unsupported in the record and is thus based on "untenable grounds," or (3) was reached by applying the wrong legal standard and is thus made "for untenable reasons." *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (*quoting State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

### **2. Larisch's Offender Score Was Accurately Calculated Because Counts One, Two And Five Are Separate Criminal Conduct.**

Offenses considered same criminal conduct will not be used in a defendant's offender score against each other and will be counted as one crime for sentencing purposes. RCW 9.94A.589(1). Same criminal conduct as used in RCW 9.94A.589(1) "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." If one of the elements outlined in RCW 9.94A.589(1) is missing, the offenses are not considered same criminal conduct. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000) (citation omitted). While the court will analyze whether one crime furthered the next, the court must look at the specific facts of the case. *State v. Longuskie*, 59 Wn. App. 838, 847, 807 P.2d 1004 (1990).

A defendant waives raising a claim that the trial court failed to properly calculate his or her offender score by failing to count multiple offenses as same criminal conduct if that defendant failed to raise the issue at the time of sentencing. *State v. Brown*, 159 Wn. App. 1, 16, 248 P.3d 518 (2010), *citing* *State v. Jackson*, 150 Wn. App. 877, 838, 209 P.3d 553 (2009). Larisch did not argue that Counts One, Two and Five were same criminal conduct during his sentencing hearing. See RP 325-35. Therefore, Larisch has waived raising the issue on appeal.

Arguendo, if this Court decides to review the issue, the criminal intent and victims, as well as the time and place are all separate, and the counts are not same criminal conduct.

The criminal intent and victims of the theft and the trafficking charges is different. *State v. Walker*, 143 Wn. App. 880, 891, 181 P.3d 131 (2008). In *Walker*, the defendant was charged and convicted of stealing cedar trees and then selling the cedar. *Walker*, 143 Wn. App. at 884-85. This Court discussed whether the two crimes were same criminal conduct when Walker raised an ineffective assistance of counsel claim regarding failing to argue same criminal conduct at sentencing. *Id.* at 890-93. This Court agreed that the theft of the trees could have furthered the trafficking charge. *Id.* at 891. This Court held that the criminal intent in a trafficking charge is to sell or dispose of the stolen items to a third party while the criminal intent for theft is to deprive a person of their property. *Id.* This Court also held there were two different victims, the victim of the theft was the owner of that property, while the victim of the trafficking was the person who could not obtain clear property to the items being sold. *Id.*

The item stolen in Count One was the Kubota excavator owned by Mr. Gray and Mr. McEntyre. The stolen property

possessed by Larisch for Count Two was on a different date and time than the initial theft. While the trailer trafficked to Mr. Fisher in Count Five was stolen at the same time as the excavator, the victim of Count Five was Mr. Fisher, who purchased the trailer and was now deprived of the property once it was determined it was the one stolen from the nursery. Further the criminal intent for each of these crimes is distinct. Also, the time and place that the different counts occurred are different. The excavator was stolen on July 3, 2014. RP 45. Larisch possessed the stolen trailer and bucket at a later date. RP 90-92, 189. The trailer was sold to Mr. Fisher at yet another time and place. RP 152. The trial court did not err when it calculated Larisch's offender score determining each count was separate criminal conduct. This Court should affirm Larisch's sentence.

**E. THE TRIAL COURT MADE SUFFICIENT FINDINGS FOR THE IMPOSITION OF THE NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS.**

Larisch argues that the trial court imposed legal financial obligations without any consideration of his ability to pay. Brief of Appellant 35-38. This is not an accurate statement of the trial court's ruling. The trial court did take into consideration that Larisch would have the ability to pay his legal financial obligations when it

imposed Larisch's sentence. Further, Larisch did not object to the imposition of the legal financial obligations. RP 330-32. This court should affirm the imposition of the legal-financial obligations.

A defendant who at the time of sentencing fails to object to the imposition of non-mandatory legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Unpreserved legal financial errors do not command review as a matter of right. *Blazina*, 182 Wn.2d at 833. The trial court is required to consider a defendant's current or future ability to pay the proposed legal financial obligations "based upon the particular facts of the defendant's case." *Id.* at 834.

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 880-83. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814,

822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear challenge to the restitution order when the defendant objected to the restitution amount for the first time on appeal). Larisch's 96 month sentence alone is not enough to support the argument that he had the present inability to pay the non-mandatory legal financial obligations.

RCW 10.01.160(3) requires a trial court to consider the individual defendant's current and future ability to pay non-mandatory legal financial obligations by considering that defendant's financial circumstances. *Blazina*, 182 Wn.2d at 837. The records must reflect this inquiry. *Id.* at 838. That was done in this case. The State requested the trial court make a finding that the record in the case support the finding that Larisch would have the ability to be employed in the normal course of Department of Corrections business and would be able to make small monthly payments while incarcerated. RP 331. The trial court adopted this finding. RP 331. The record was clear that Larisch was performing manual labor as well as known for his ability to work on vehicles, as his nickname was "Mechanic Mike." RP 112, 116, 186-88. Larisch even admitted he was a mechanic by trade. RP 92. The trial court's finding was supported by the record, this court should affirm the



imposition of legal financial obligations. If this Court holds the trial court's findings are not sufficient the State respectfully requests this Court remand for a hearing whereas the trial court has the ability to do a full inquiry as to Larisch's ability to pay his legal financial obligations and enter findings based upon that inquiry.

#### **IV. CONCLUSION**

Deputy Humphrey's testimony regarding the gesture Larisch made in response to being confronted with the fact he had sold an engine and transmission to Mr. Perry was not a comment on Larisch's right to silence. Larisch received effective assistance from his trial counsel and if his counsel was deficient in any way, Larisch was not prejudiced by his counsel's conduct. Further, the State presented sufficient evidence to sustain the conviction for Count Six. The trial court did not erroneously calculate Larisch's offender score and he was properly sentenced. Finally, the trial court did make adequate findings, on the record, that Larisch had the present and future ability to pay the non-mandatory legal financial

obligations the court imposed at sentencing. This Court should affirm Larisch's conviction for Count Six and his sentence.

RESPECTFULLY submitted this 16<sup>th</sup> day of June, 2015.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

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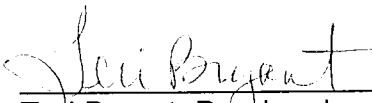
by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  MICHAEL LARISCH,  Appellant.	No. 46850-6-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On June 16, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: [jahayslaw@comcast.net](mailto:jahayslaw@comcast.net).

DATED this 16<sup>th</sup> day of June, 2015, at Chehalis, Washington.

  
\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

## LEWIS COUNTY PROSECUTOR

**June 16, 2015 - 4:22 PM**

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